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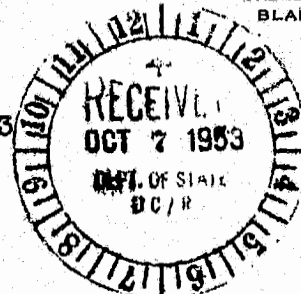
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5 October 1953



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The Honorable John Foster Dulles,
Secretary of State,
Washington, D. C.,
U. S. A.

Dear Sir:

As you are aware, considerable perturbation has been created among the American community in Japan by the action of the United States Senate in attaching to its ratification of the Japanese-American Treaty of Friendship, Commerce and Navigation a reservation to the "professions-clause", Article VIII, Paragraph 2. The parallel reservation adopted by the Japanese Government, together with the abundant portents now visible that discriminatory legislation will be adopted to bar American lawyers, doctors and other professional men from the practice of their professions in Japan, offers a serious threat to the conduct of American business- and missionary-activities, education and other interests in Japan. The recent revision of the Administrative Agreement, subjecting American military personnel to the criminal jurisdiction of the Japanese courts, points up the seriousness of the matter in the particular case of the lawyers.

The American lawyers, of whom some fifty-odd have been licensed for practice by the Supreme Court of Japan, and the American doctors, numbering with dentists and nurses some half-a-hundred, practicing in Japan, have designated me as their representative to present to the Department of State the request that the Department give to the Japanese Government assurances such that the reciprocity-provisions of Article VIII, Paragraph 2, as amended, of the Treaty can be availed of by American citizens in the professional fields in Japan.

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BEN BRUCE BLAKENEY

JOHN FOSTER DULLES

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As we view the matter, the Treaty--while by its reservation preserving to the States the right to bar aliens from practice of the professions--does not empower the Federal Government to do so insofar as concerns its territories. It is our belief that the Treaty, upon a proper interpretation, requires the admission to practice the professions of Japanese citizens, otherwise qualified, despite their alienage. If the Department of State agrees with this interpretation and will inform the Japanese Government that such is in the opinion of the American Government the true meaning and intentment of the clause in question, American professional men licensed by any such Federal territory can claim the reciprocal right to practice in Japan.

* I have prepared and submit to you herewith a memorandum of our views on this matter. The specific question therein discussed is whether the provisions of the Treaty as amended require the courts and the governmental agencies of the United States, and the Federal territories, to license to practice law, medicine or the other professions a Japanese applicant who otherwise satisfies the prerequisites for a license, despite requirements of laws, regulations or rules prescribing citizenship of the United States. If this proposition be established, the right of Americans licensed in any such Federal territory to practice in Japan will be indubitable.

It is urged that the Department give its attention to this matter with a view to creating--before Japanese resentment and discrimination attain their full development--an atmosphere of good faith, friendship and liberal carrying out of treaty-obligations. If this can be done, we can expect that American professional men in Japan will not be discriminated against, and may continue to discharge their important function of advising, healing, teaching, defending, their fellow-Americans there.

Respectfully,

Ben Bruce Blakeney

* Enclosure *OTL. No. 100*
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DIV 1

M E M O R A N D U M

on the Right of Japanese Citizens to Practice
the Professions in the Federal Jurisdictions,
under the Treaty of
Friendship, Commerce and Navigation

STATEMENT

A Treaty of Friendship, Commerce and Navigation has been concluded between the United States and Japan. This Treaty contains one of the standard "professions-clauses", in the following language (Art. VIII, ¶ 2):

2. Nationals of either Party shall not be barred from practicing the professions within the territories of the other Party merely by reason of their alienage; but they shall be permitted to engage in professional activities therein upon compliance with the requirements regarding qualifications, residence and competence that are applicable to nationals of such other Party.

In advising and consenting to the ratification of this Treaty, the United States Senate attached the following reservation:

Article VIII, Paragraph 2, shall not extend to professions which, because they involve the performance of functions in a public capacity or in the interest of public health and safety, are state-licensed and reserved by statute or constitution exclusively to citizens of the country, and no most-favored-nation clause in the said Treaty shall apply to such professions.

Upon the communication to the Japanese Government of the above reservation, it agreed thereto and, on its part, ratified the Treaty subject to a reservation intended to parallel the United States' reservation. That reservation, which has been agreed to by the United States, is in this language:

Japan reserves the right to impose prohibitions or restrictions on nationals of the United States of America with respect to practicing the professions referred to in Article VIII, paragraph 2, to the same extent as States, Territories or possessions of the United States of America, including the District of Columbia, to which such nationals belong impose prohibitions or restrictions on nationals of Japan with respect to practicing such professions.

The Japanese Government has explained that "the phrase, 'States, Territories or possessions of the United States, including the District of Columbia, to which such nationals belong' used in the said note shall mean States, Territories or possessions of the United States, including the District of Columbia, where such nationals are admitted or licensed to practice such professions, or if such nationals are not admitted or licensed to practice such professions in any such areas, where such nationals are domiciled."

Proposals are now being made in Japan that the Lawyers' Law and the law licensing foreign doctors in Japan be amended to provide that foreign lawyers and doctors will be licensed to practice in Japan only if the jurisdiction by which the foreign lawyer or doctor is licensed allows Japanese lawyers or doctors to practice their professions there. The same situation will doubtless confront the practitioners of such other professions as dentistry, nursing, engineering, accountancy, and others.

POINT I

THE TREATY, EXCEPT INsofar AS THE RESERVATION
IS APPLICABLE, SUPERSEDES EXISTING LEGISLATION
IMPOSING THE REQUIREMENT OF CITIZENSHIP

That a treaty of the United States supersedes prior inconsistent legislation, State or Federal (including State constitutional provisions), is a proposition too familiar to require more than statement. The Constitution of the United States provides that a treaty made "under the Authority of the United States" shall be the supreme law of the land (Art. VI, § 2); and it therefore supersedes any prior law, State or Federal, in conflict with its terms. Head Money Cases, 112 U.S. 580 (1884); United States v. Lee Yen Lai, 185 U.S.

213 (1902); Hijo v. United States, 194 U.S. 315 (1904). "The treaty making power is independent of and superior to the legislative power of the states, [and] the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments", Nielson v. Johnson, 279 U.S. 47, 52 (1929); cf. Ware v. Hylton, 3 Dall. 199 (U.S. 1796).

Leaving aside for the moment the questions raised by the reservation attached to it, the present Treaty has therefore superseded preëxisting legislation, whether in form of statute, rule or order, whether Federal, State or territorial, which requires, as a qualification for admission of a Japanese citizen to the practice of the professions, citizenship of the United States.

The treaty was made to strengthen friendly relations between the two nations. As to the things covered by it, the provision quoted establishes the rule of equality between Japanese subjects while in this country and native citizens. Treaties for the protection of citizens of one country residing in the territory of another are numerous, and make for good understanding between nations. The treaty is binding within the State of Washington. Baldwin v. Franks, 120 U.S. 678, 682-683. The rule of equality established by it cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States.

Asakura v. City of Seattle, 265 U.S. 332, 341 (1924). Such a treaty-provision as the present, guaranteeing the right to pursue a calling, is moreover self-executing, and "operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts". Ibid; Foster v. Nielson, 2 Pet. 253 (U.S. 1829).

But for the reservation attached by the United States, therefore, it would be clear that under the "professions-clause" of the present Treaty, no State, no territory of the United States, no inferior governmental unit, would have the power to continue vis-à-vis

citizens of Japan the requirements of its constitution, its laws or its regulations or rules of court prescribing citizenship of the United States as a qualification for the practice of the professions. Assuming the reservation to the Treaty to have preserved State-laws in this regard, it remains to consider the effect within the Federal jurisdiction and the Federal territories of the Treaty as ratified.

POINT II

THE PROVISIONS OF THE TREATY DO CONSTITUTE A GUARANTEE BY THE UNITED STATES GOVERNMENT TO JAPANESE CITIZENS OTHERWISE QUALIFIED OF THE RIGHT TO PRACTICE THE PROFESSIONS WITHIN THE LIMITS OF THE FEDERAL JURISDICTION

Consideration of the language, the history and the purpose of the Treaty lead alike to the conclusion that the Senate, in attaching its reservation to the Treaty, did not intend to bar Japanese citizens from practice of the professions in the United States generally--nor indeed to bar them at all--but on the contrary intended to guarantee them that right except only insofar as the several States might, each for itself, establish a contrary rule.

A

The Language of the Treaty Offers such a Guarantee

(1) The Rules of Statutory Construction Require that Result

Article VIII, Paragraph 2, of the Treaty, as quoted above, explicitly and unequivocally guarantees that Japanese citizens may practice within the territories of the United States their professions, on sole condition of compliance with the requirements for practice applicable to American citizens. The word "territories" clearly includes all of the States of the United States and all territory under Federal jurisdiction, which comprises the District of Columbia and the territories. The only limitation upon this guarantee is contained in the reservation quoted above. No mention is made in that reservation of Federal territory; only the States are mentioned. It would therefore follow that the guarantee of the right to practice the professions within territories under Federal jurisdiction remains.

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To contend that the reservation preserved the right of the Federal Government or its territories to impose the requirement of citizenship requires the broadening of the Treaty's "state-licensed" to mean "Federal or state licensed". This was not the language adopted by the legislature, and would be contrary to the normal usage of language in American constitutional law, by which the State is distinguished from the Federal Government. The legislature is familiar with this distinction, and such an interpretation of its language is totally unwarranted, by the basic rules of statutory construction, by the principles of treaty-construction, and by the legislative history.

The reasonable interpretation of the language of the reservation must on ordinary principles of statutory construction be that the guarantee is removed, and the right to discriminate preserved, with respect only to the rights of the States, as opposed to the Federal Government, to preserve any ban on the practice of those professions which involve performance of functions in a public capacity or in the interest of public health and safety. Accordingly, if a Federal territory by statute, constitution or rule of court attempted to reserve the practice of law or medicine to American citizens, such action would be repugnant to Article VIII, Paragraph 2, of the Treaty, which would therefore supersede such statute, constitution or rule.

(2) The Principles of Treaty-Construction Require the Same Result

It is a familiar canon of the interpretation of treaties that they shall be "liberally construed so as to effect the apparent intention of the parties. . . . When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred", Nielson v. Johnson, 279 U.S. 47, 51 (1929); Asakura v. City of Seattle, 265 U.S. 332 (1924). A treaty must be so interpreted as to give effect to all its parts, United States v. Reid, 73 F.2d 153 (9th Cir. 1934), cert. denied, 299 U.S. 544 (1934).

Any interpretation of this Treaty which did not grant to Japanese citizens the right on a reciprocal basis to

practice their professions within the Federal jurisdiction would not give effect to all its parts--for the "professions-clause", no longer guaranteeing any right, would cease to have meaning or effect. Such an interpretation would not be that liberal one which would enlarge the rights which might be claimed under it; it would not effect the apparent intention of the parties, that that provision of the Treaty should have some effect; such an interpretation would, in short, nullify and render nugatory the "professions-clause". This would be to say that the legislature had used language which was without meaning.

Application of the usual canons of interpretation of treaties thus requires that this guarantee of the right to practice the professions be given that interpretation--that this Treaty be given that interpretation which will give effect to all its parts, including the "professions-clause", to carry out liberally the apparent intent of the parties.

B

The Legislative History of the Treaty Shows
that the Senate did not Intend to Bar Japanese
Citizens from Practice of the Professions
within the Federal Jurisdictions

The Treaty as originally signed contained an unrestricted guarantee to Japanese citizens that they would not be barred from practicing their professions in the United States merely by reason of their alienage. In advising and consenting to the ratification of the Treaty, the United States Senate made the reservation of professions which are "state-licensed". The word "state" may of course bear the meaning of "the nation" or "one of the forty-eight States". The legislative history of this reservation is replete with language which makes it clear that the intention of the Senate in attaching the reservation was to insure that the Treaty would not invade the reserved powers of the States--language which makes clear that the Senate did not intend the meaning "the nation". It was this reserved power of the States to legislate on local matters which was being guarded; no intention is manifested that aliens should be barred from practicing their professions in the United States generally, but on the contrary such intention was expressly disclaimed by the legislature.

During the hearings held on July 13, 1953, before the Subcommittee of the Senate Foreign Relations Committee appointed to consider this and several other similar commercial treaties, Senator Hickenlooper, the chairman of the Subcommittee, made this point clear in saying (Subcommittee Hearings, p. 28):

I want it clearly understood that the members of the committee who objected to that provision in the Israel Treaty and the Japanese Treaty, are not raising their objection to the practice of the professions by foreign nationals in this country. The objection they raised was that the constitutional provisions and laws of certain States were abrogated. Most of the States in the Union have no citizenship requirement so far as most of the professions are concerned.

Only 13 or 14 States, I forget the exact number, either have a constitutional provision or a statute requiring citizenship in this country as one of the prerequisites to being admitted to the practice of certain professions. Those statutes would of course be abrogated by such treaty. It is the desire on the part of the members of the committee, and I am sure on the part of the Senate, to protect the rights of each of our 48 States under their own constitutions to regulate professions which have to do with the public good and health.

I think this reservation adequately protects these matters.

Further, in the course of the discussion of the Treaty on the floor of the Senate, Senator Hickenlooper--who, as chairman of the Subcommittee, explained the Treaty to the Senate--stated in connection with this clause (Cong. Rec., 1620, July 21, 1953):

But the principle of these treaties destroying the constitutional limitations of State constitutions is, of course, a question which is very, very controversial. I shall accept my full share of responsibility in this matter, because I am very much opposed to using the device of treaties--I do not mean to say they were being used in this case--to destroy the constitutional prerogatives of individual States or invading to any great degree the rights of the States to legislate within their own boundaries in matters affecting themselves and their own local administration and local affairs.

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Great objection was raised by many persons to these provisions. The objection did not go to the extent that an alien should not be permitted to practice a profession in this country. That was not a part of the objection, because there has been no objection raised, so far as I know, to an alien practicing professions in any State in the United States where there is no prohibition. So the question of alienage in and of itself was not an issue in these treaties. There was a question of the destruction of the constitutional power of certain States or the destruction of their right to legislate in matters of public health and public interest within their States.

In view of these statements, it is clear that the Senate had no intention of barring Japanese citizens from practicing professions within the limits of the Federal jurisdiction, but intended solely to preserve the rights of the several States to legislate on the matter. The Senate has said that it purposed to preserve State-power, but it has nowhere mentioned Federal power, which was therefore evidently not within its intention. On the contrary, it can only be taken that the Senate intended to, and did, affirmatively guarantee to Japanese citizens the right to practice their professions in America except as a given State might prohibit; which means a guarantee within the Federal territories--including the District of Columbia and other possessions--as well as within those States which do not see fit, by constitution or by statute, to bar aliens on the ground of their alienage.

C
The Purpose of the Treaty Shows that Such a
Guarantee was Intended

The purpose of the Treaty is evidently to facilitate commercial relations between the contracting Powers and between their nationals, and as a part of that scheme to enable nationals of one country carrying on their activities within the territory of the other to be secure in the right of having available to them the professional services of practitioners of their own nationality. To effect this, the Treaty as originally drafted contained the most broad and liberal guarantee. The guarantee was restricted and limited by the reservation attached, but there is no evidence of an inten-

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tion that it should be withdrawn or canceled in its entirety; indeed, as we have seen in considering the legislative history, any such intention was categorically disclaimed. Had the legislature desired to withdraw the guarantee, it could and would very easily have rejected the clause in question in toto; but it would not as it did carefully and scrupulously have limited it.

Only by so interpreting this Treaty as to preserve this guarantee on the reciprocal basis upon which the language of the Treaty now puts it, can the purpose of the Treaty to facilitate intercourse between the Powers by permitting their nationals to have available the professional services of fellow-nationals of their choice be effectuated. Consideration of the purpose of the Treaty likewise thus leads to the conclusion that the Federal Government and its territories are bound by it to admit otherwise qualified Japanese citizens to the practice of the professions within their jurisdictions. By no other interpretation can the "apparent intention of the parties be effected".

CONCLUSION

The conclusion therefore is that the language of the Treaty, when interpreted by accepted canons of statutory and treaty-interpretation; the legislative history of the Treaty, showing the intent with which the language in question was inserted; and the purpose of the Treaty--all compel the conclusion here contended for, none is consistent with a contrary conclusion.

Respectfully submitted,

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5 October 1953